

Lelievre⁽⁹⁾:-

"Their Lordships would hesitate very much to interfere with the unanimous judgment of the court below upon a matter of this kind, which is to be regarded as a matter of procedure only, unless they were clearly satisfied that the court had made a great mistake in the construction put upon these Statutes."

It appears to their Lordships that the Federal Court in *Ratnam v. Cumarasamy* and *Peninsular Land Development Sdn. Bhd. v. K. Ahmad* (*supra*) and subsequently in *Hong Kim Sui v. Malayan Banking Bhd.*,⁽¹⁰⁾ *Arumugam Pillai v. Government of Malaysia*⁽¹¹⁾ and *Ng Cheng Yoon v. Mah Binti Mat Isa*⁽¹²⁾, all of which are unanimous, reserved judgments, has established over the years a settled practice of applying Lord Alverstone's test in the *Bozson* case in order to determine whether an order is final or interlocutory. Their Lordships are unable to find any error in this reasoning: on the contrary their Lordships feel entitled to say that the test is both sound and convenient. In three of the five cases cited above the appeal was against leave to sign judgment in summary proceedings. Thus the effect of the practice adopted by the Federal Court in such cases is in line with the English practice as established by Statute since 1925. In any event, this being a matter of practice and procedure, their Lordships, in accordance with their practice, will uphold the decision of the Federal Court.

Lord Rawlinson for the appellant drew attention to the cases of *Nagappa Rengasamy Pillai v. Lim Lee Chong*⁽¹³⁾, *Sri Jaya Transport Company Ltd. v. Fernandez*⁽¹⁴⁾ and *T.O. Thomas v. K.C. I. Reddy*⁽¹⁵⁾ as well as the unreported case of *Malayan Banking Berhad v. Yap Seng Hock*⁽¹⁶⁾ (1980) and invited the Board to express a view on what were said to be inconsistencies in the application of Order 54, Rules 22 and 22A of the Rules of the Supreme Court of Malaysia. Their Lordships consider that they must decline from so doing firstly because any views they express would be purely *obiter* in the light of the conclusion they have reached on the main issue in this appeal, and secondly because the points raised are purely procedural and ought to be resolved by the Federal Court.

The second main issue in this appeal is whether the Federal Court was wrong in granting to the respondents unconditional leave to defend the claim brought by the appellant against them. It is also contended that the respondents were allowed on appeal to the Federal Court to put forward new and different grounds from that relied on by them before Harun J. As to the putting forward of new and different grounds, this involves the discretion of the court and since it has not been shown that the court proceeded on some wrong principle the Board will not intervene. As to the granting of unconditional leave the Federal Court had before it material which, among other things, showed that a number of important issues of fact are in contention between the appellant and the respondents including the precise circumstances in which the appellant accepted Certificate No. 0227 and the memorandum of transfer signed by Dr. Chong. It would be inappropriate for their Lordships to say more, at this stage, than that these issues require to be tried. There was in addition material showing that it may be impossible to restore the parties to their original positions, some two-and-a-half years having elapsed before the matter came before the

A courts during which time the appellant and his associates had control of U.H. and made substantial changes in the company's affairs. These considerations commend themselves to their Lordships as justifying the conclusion reached by the Federal Court that the respondents should have unconditional leave to defend.

B Their Lordships will advise His Majesty the Yang di Pertuan Agong that the appeal should be dismissed, with costs.

Appeal dismissed

Solicitors: *Kingsford Dorman, Mcfarlanes.*

C

GARDEN CITY DEVELOPMENT BERHAD v. COLLECTOR OF LAND REVENUE, FEDERAL TERRITORY

[P.C. (Lord Keith of Kinkel, Lord Roskill, Lord Brandon of Oakbrook, Lord Brightman and Sir Sebag Shaw) May 26, 1982]
[Privy Council Appeal No. 6 of 1980]

D

Land Law - Classification of land - Land alienated before the coming into force of National Land Code - Town Land held under Registry Title - Land to be used neither for agricultural nor industrial purposes - Whether there was need to apply for imposition of category of use of land to be used for building - Time for appeal - National Land Code, ss. 53, 110, 116, 127, 128 & 418.

E

The appellants are proprietors of a site in the city of Kuala Lumpur upon which they have erected a substantial shopping-cum-office complex, known as Wisma Central. They applied for subdivision of the land to enable part of it to be given for road-widening. In reply the Collector of Land Revenue stated that the appellants should first apply for conversion under section 124 of the National Land Code. The appellants thereupon applied for conversion of the land. Subsequently they were informed by the Director of Lands and Mines, Federal Territory, that the Land Executive Committee had decided that their application would only be approved if (a) the appellants made certain payments for premium and tax on the change of the category of use of the land to building and (b) they accepted a 99 year lease in exchange for their title. The appellants did not surrender the title or pay the premium. The Collector of Land Revenue then served a notice on the appellants under section 128 of the National Land Code to remedy their failure to alter the condition of the land use from "agriculture to commercial". The appellants applied for an order that the Collector of Land Revenue cancel the notice on the ground that the notice was bad and invalid. It was argued that as there was no expressed endorsement on the document of title pertaining to the category of land use there was no necessity for them to apply for conversion. Harun J. allowed the application in the High Court but on appeal the Federal Court held (a) the land in question was town land held under registry title and on the coming into force of the National Land Code came under the provisions of section 53(3) of the Code which provides that it shall be used neither for agricultural nor for industrial purposes; (b) in order to use the land for building, the owners have to apply for the imposition of the category of building under section 124 of the National Land Code; and (c) in this case the appellants have failed in erecting the building to apply for the imposition of the category "building" to their title and this failure constituted a breach of the condition by reason of which action under section 128 of the National Land Code could be and was taken - See [1979] 1 M.L.J. 223. The appellants appealed.

F

G

H

I

Held, allowing the appeal: (1) the stamping of the words "Lease for agricultural land" on the original lease could not in itself have the effect of imposing a condition for use for agriculture only and in the circumstances it was not possible to infer from the lease an intention to restrict the use of the land to agriculture;

(2) as the land was town land held under registry title, the provisions of section 53(3) of the National Land Code applied to the land with the result that there was an implied condition that it shall be used neither for agricultural nor for industrial purposes;

(3) there is no ground for reading into section 53 (3) of the National Land Code a general prohibition against use for building purposes;

(4) in a timeous appeal against the section 128 notice, the appellants were in a position to open up all questions upon which its validity depended, in particular the questions whether their land was subject to the condition of agricultural use only and whether on a proper construction of section 53 use of it for building purposes was prohibited.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

David Widdicombe Q.C. (Dato Kok Wee Kiat with him) for the appellant.

Donald Rattee Q.C. (Robert Ham with him) for the respondent.

Cur. Adv. Vult.

Lord Keith of Kinkel (delivering the Judgment of the Board): This appeal comes before the Board from an order of the Federal Court of Malaysia dated December 14, 1978. By that order the court (Lee Hun Hoe C.J., Borneo, Wan Suleiman and Chang Min Tat F.JJ.) reversed a judgment of Harun J., in the High Court in Malaysia, allowing an appeal by the present appellants, under section 418 of the National Land Code, Act 56 of 1965 ("the Code"), against a notice dated July 12, 1976 issued to them by the respondent under section 128 of the Code.

The history of events leading to the appeal is fully set out in the judgments of the courts below, and, as little of it is relevant to the issues which now require to be determined, their Lordships find it unnecessary to recapitulate it.

The appellants are proprietors of a site in the city of Kuala Lumpur, within the Federal Territory, upon which they have erected a substantial shopping-cum-office complex, known as Wisma Central. The respondent issued the notice complained of upon the basis that the land forming the site had thereby become liable to forfeiture.

Subsection (1) of section 128 provides:—

"128 (1) Where—

- (a) any alienated land is liable under section 127 to forfeiture to the State Authority for breach of any condition, and
- (b) it appears to the Collector that the breach is capable of being remedied by the proprietor within a reasonable time, the Collector shall serve, or cause to be served, on the proprietor a notice in Form 7A specifying the action required for remedying the breach, and calling upon him to take such action within the time therein specified."

Section 127 (1) provides:—

"127 (1) Upon any breach arising of any condition to which any alienated land is for the time being subject —

- (a) the land shall become liable to forfeiture to the State Authority, and
- (b) except in a case where action for the purpose of causing the breach to be remedied is first required to be taken under section 128, the Collector shall proceed with the enforcement of the forfeiture in accordance with the provisions of section 129."

It is to be observed that in relation to the Federal Territory the State Authority is now the Land Executive

A Committee of the Territory.

The main issue in the appeal is whether the appellants are in breach of a condition to which the land forming the site of Wisma Central is subject, so as to attract the forfeiture provisions of section 127, failing remedy of the breach. Section 110 of the Code provides, *inter alia*, by paragraph (a) that land alienated before the commencement of the Act shall be subject to "such express conditions and restrictions in interest (if any) as, immediately before that commencement, were endorsed on the document of title thereto (or, in the case of a certificate of title, referred to therein)". The site in question, which extends to some 2 acres, forms part of a larger area of land, about 100 acres in extent, which was originally alienated by a lease in perpetuity dated July 20, 1886 granted by the Sultan of Selangor in favour of one H.C. Syers. That land went through various subdivisions, and the certificate of title (No. 3443) under which the appellants hold their plot was first issued on August 8, 1909. It is a registry title, as the Federal Court held and the respondent does not now dispute, and it describes the land as situated in the town of Kuala Lumpur. The evidence is that for many years a substantial dwelling house occupied part of the land, until demolished to make way for Wisma Central. It is common ground that the appellants hold subject to the conditions contained in the lease of 1886, and the first question to be determined is whether, as the respondent contends and the appellants deny, these conditions properly construed have the effect that the land is required to be used for agricultural purposes only. It is not in dispute that, if the answer to that question is in the affirmative, the appellants committed a breach of the condition by erecting Wisma Central on the land.

At the top of the first page of the 1886 lease there appear, in capital letters, the words "Lease for Agricultural Land". They give the impression of having been imprinted by rubber stamp, applied somewhat unevenly. The nature of the printing is different from that contained in the body of the lease, and there is nothing to indicate whether it was applied before or after the lease was executed. Their Lordships are of opinion that in the circumstances the presence of these words cannot in itself have the effect of imposing a condition of use for agriculture only. They may have been intended to be a description of the lease, but whether or not it is an accurate description can only be ascertained by examining the conditions contained in the body of the lease. There are nine such conditions, and none of them makes any specific reference to agriculture or agricultural use. Counsel for the respondent founded strongly on condition 5 as leading by necessary implication to the conclusion that the use of the land was restricted to agriculture.

"That the Government may take, or grant licences for taking, any timber or other natural produce upon this land."

This condition was claimed to be inconsistent with the use of the land for anything but agricultural purposes. In their Lordships' opinion there is no necessary inconsistency. There is no evidence as to whether or not there was ever any timber on the land. What is intended to be covered by "other natural produce" is obscure, but plainly the grantee of the lease cannot be under any obligation to allow the

land to remain in a state capable of bearing natural produce, as this would derogate from the grant to the effect of preventing him making any beneficial use whatever of it. In the circumstances it is not possible to infer an intention to restrict the use of the land to agriculture.

That disposes of the primary argument for the respondent. But there was advanced on his behalf a secondary argument, which found favour with the Federal Court, to the effect that, if the primary argument failed, then on a proper construction of certain provisions of the Code the land at present may not lawfully be used for the erection of a building such as Wisma Central.

The provisions in question are to be found in section 53 of the Code. Section 53(1) is in these terms:—

"This section applies to all land alienated before the commencement of this Act other than land which, immediately before that commencement, is subject to an express condition requiring its use for a particular purpose."

The primary argument for the respondent having failed, it follows that the section applies to the appellants' land.

Subsection (2) enacts that, subject to two provisos which it is unnecessary to set out:

"All land to which this section applies which is at the commencement of this Act—

- (a) country land, or
 - (b) town or village land held under Land Office title,
- shall become subject at that commencement to an implied condition that it shall be used for agricultural purposes only."

This provision does not affect the appellants' land, since it is town land held under registry title, not Land Office title. It follows that Subsection (3) does affect the appellants' land.

Subsection (3) is in these terms:—

"All other land to which this section applies shall become subject at the commencement of this Act to an implied condition that it shall be used neither for agricultural nor for industrial purposes: Provided that this condition —

- (i) shall not prevent the continued use of any part of the land for any agricultural or industrial purpose for which it was lawfully used immediately before the commencement of this Act; and
- (ii) shall not apply to any part of the land which is occupied by or in conjunction with—
 - (a) any building lawfully erected before that commencement, or
 - (b) any building erected after that commencement, the erection of which would (under section 116) be lawful if the land were subject instead to the category "building".

This provision clearly prevents the appellants' land being lawfully used for agricultural or industrial purposes. But the respondent argues that by implication it also precludes the lawful use of the land for the erection of a building such as Wisma Central. It is unnecessary, for the disposal of this argument, to enter upon an examination of the general scheme embodied in the Code in relation to the eventual allocation of all land into one or other of the three categories of land use "agriculture", "building" and "industry", and the procedures whereby this categorisation may take place in relation to any particular land. In their Lordships' opinion the argument is wholly unsound. It seeks to derive from the provisos to the main enactment of the subsection an inference enlarging the scope of that

enactment so that the implied conditions thereby imposed would prohibit not only use for agriculture or industry but the erection of buildings generally. No such inference can properly be drawn. As a general rule, the purpose of a proviso is to relax to some extent the full rigour of the main enactment, and the provisos to section 53(3) present no features indicating that they constitute an exception to the rule. The purpose of proviso (i) is clear. It is to preserve the lawfulness of use for agricultural or industrial purposes which was established before the Code came into force. As for proviso (ii), it does not yield up the whole of its meaning easily, and the word "instead" in paragraph (b) is particularly hard to construe. But paragraph (a) clearly exempts from the prohibition of agricultural and industrial use any building, or land ancillary thereto, erected before the commencement of the Act. In regard to paragraph (b), it is to be observed that section 116 of the Code, which deals with the category of land use "building" and the implied conditions applicable to that category, contemplates by subsection (1)(b) that there may be exceptions to the general prohibition against the use of land in this category for agricultural or industrial purposes. The intention of paragraph (b) of proviso (ii) appears to be to provide similar exceptions for land to which section 53(3) applies. There is therefore no good ground for reading into section 53(3), by necessary implication, a general prohibition against use for building purposes.

The final argument of the respondent is that the appellants' appeal to the High Court was out of time. The appeal was made under section 418(1) of the Code, which provides:

"418.(1) Any person or body aggrieved by any decision under this Act of the State Commissioner, the Registrar or any Collector may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court."

The notice under section 128 of the Code, of which the appellants complain, was issued on July 12, 1976. The originating motion which initiated the appeal is dated October 11, 1976. So if the relevant "decision" of the Collector was the section 128 notice, the appeal was made within the statutory time limit. "Decision" is defined by section 418(3) as including "any act, omission, refusal, direction or order". The section 128 notice required the appellants to take certain action to remedy an alleged breach of a condition affecting the use of their land. It was clearly, therefore, within the definition as being a "direction". So much was accepted on behalf of the respondent. But it was maintained that the relevant decision, against which the appellants ought to have appealed, was taken much earlier, namely on February 17, 1973. On that date the Collector then having responsibility, in response to an application by the appellants for subdivision of the land to enable part of it to be given off for road widening, sent to the appellants a letter in these terms:—

"With reference to your application ... you have to apply under section 124 National Land Code to alter the condition/impose an appropriate express condition on this land."

This letter was said to constitute a decision that the land was subject to an express condition that it was to be used for agricultural purposes only, which stood and was

binding on the appellants unless timeously appealed against, which it had not been.

Their Lordships have no hesitation in rejecting this argument. The letter of February 17, 1973 is no more than an expression of opinion as to the legal position, and can in no sense be regarded as a formal decision under the Act. Even if it were, there is no good reason why, in dealing with an appeal against the section 128 notice, the court should be precluded from examining, so far as necessary for the disposal of that appeal, the validity of prior decisions forming the background to the issue of that notice. The notice required certain action to be taken by the appellants, and it very directly affected their rights inasmuch as failure to take such action was liable to lead to forfeiture of their land. A challenge to the validity of the notice was essential to the protection of their interests, which was not the position in regard to any earlier purported decision of the Collector or the Land Executive Committee, in particular the letter of February 17, 1973 or the letter of February 17, 1976 (alternatively founded on as being the relevant decision), requiring payment of a premium for placing the land in the building category under section 124 of the Code. Their Lordships are accordingly of opinion that, in a timeous appeal against the section 128 notice, the appellants were in a position to open up all matters upon which its validity depended, in particular the questions whether their land was subject to the condition of agricultural use only and whether on a proper construction of section 53 use of it for building purposes was prohibited.

For these reasons their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be allowed, and that the order of the High Court directing the cancellation of the section 128 notice should be restored. The respondent must pay the appellants' costs in the Federal Court and before this Board.

Appeal allowed.

Solicitors: *Macfarlanes; Stephenson Harwood.*

SINGAPORE REPORTS

DART SUM TIMBER (PTE.) LTD. v THE BANK OF CANTON LTD.

[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Chua JJ.)

March 9, 1982]

[Singapore - Civil Appeal No. 100 of 1980]

Company Law - Guarantee made by company director - Whether authorised to execute guarantee on behalf of company. Guarantee - Execution of Guarantee by company director - Whether ultra vires - Scope of s. 133A of Companies (Amendment) Act 1974.

Statutory Interpretation - Provision unambiguous - Intention of Legislature.

The plaintiffs/respondents claimed for \$401,793.70 and interest under a written guarantee of July 31, 1974 by which the defendants guaranteed payment on demand of all moneys which were then or might thereafter be owing by Ta Leong Produce (Pte.) Ltd. on the general balance of its account with the plaintiffs. The claim was in respect of four advances made on letters of credit.

The defendants contended that the guarantee was signed by Wong Kee Loh without their authority and that the advances were made in violation of section 133A of the Companies Act which came into force on November 15, 1974.

The facts revealed that Wong owned 400,000 shares in Ta Leong and the official address of Ta Leong and the defendants were the same.

In the lower court, D'Cotta J. held that the guarantee was executed by Wong Kee Loh and Ong Say Beng, both directors of the defendants and was in compliance with Clause 97 of the Articles of Association (see [1981] 2 M.L.J. 58). The defendants appealed against the said judgment of the learned judge.

Held, allowing the appeal: (1) in arriving at his conclusion that Wong Kee Loh had the authority, express or implied, to execute the guarantee on behalf of the defendants, the learned judge founded it mainly on the erroneous basis that Wong Kee Loh was the managing director of the defendants;

(2) the learned judge failed to appreciate that the defendants at no time had an account with the plaintiffs and that the letters of credit were opened on behalf of Ta Leong and not the defendants and that Wong Kee Loh was a main shareholder and managing director of Ta Leong, the principal debtor of the plaintiffs; no monies were advanced by the plaintiffs to Ta Leong until October/November 1975 well after section 133A of the Companies Act had come into force;

(3) the transactions were caught by the said section 133A and the effect of the section on the guarantee was to discharge it by frustration as the further performance of it had become illegal.

Case referred to:-

(1) *Sussex Peerage Case* 8 E.R. 1034

COURT OF APPEAL.

D. Johnson Q.C. (Y.M. Jumabhoy with him) for the appellants.

K.S. Chung (Miss Molly Lim with him) for the respondents.

Cur. Adv. Vult.

Chua J. (delivering the judgment of the Court): This appeal arises from a Judgment of D'Cotta J., allowing a claim by the Respondents (Plaintiffs) against the Appellants (Defendants) for the sum of \$401,793.70 together with interest thereon on a written Guarantee dated the July 31, 1974 purportedly executed by the Defendants in favour of the Plaintiffs.

At the conclusion of the hearing of the appeal we allowed the appeal and now give our reasons.